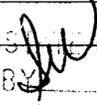


NO. 40711-6-II

COURT OF APPEALS
DIVISION II

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JAMES V. COLLINS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Lisa Worswick

No. 05-1-02343-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the State's notice to defendant that it was seeking to revoke defendant's SSOSA status for noncompliance was adequate.

B. STATEMENT OF THE CASE.

1. Procedure

On May 16, 2005, the Pierce County Prosecuting Attorney's Office charged JAMES VICTOR COLLINS, hereinafter "defendant" with three counts of rape of a child in the first degree and one count of child molestation in the first degree for sexually abusing his 6-year-old daughter. CP 1-4. On March 6, 2006, defendant pled guilty to two counts of rape of a child in the first degree. CP 7-20. The court sentenced defendant to 130 months in prison but suspended all but six months of the prison term under the Special Sex Offender Treatment Alternative (SSOSA). CP 21-34.

On January 29, 2010, the State filed a petition seeking to revoke defendant's SSOSA for noncompliance. CP 35-38.

2. Facts

Defendant was initially evaluated for the SSOSA program by Dr. Daniel DeWaelsche, a Psychotherapist, in June 2006. RP 59. Defendant

began treatment with Dr. DeWaelche in September 2006. *Id.* In order to comply with treatment, defendant was required to attend weekly therapy groups with other adult male sex offenders, discuss his progress in treatment, complete homework assignments, and submit to polygraph examinations. *Id.*

Defendant dated Shawna Gibbs for approximately four years during his SSOSA treatment. RP 8. Their relationship ended in June or July of 2009. *Id.* On December 8, 2009, defendant was issued a no-contact order prohibiting him from having any contact with Ms. Gibbs. RP 82. On December 17, 2009, Ms. Gibbs contacted Michael Cheney, the Community Corrections Officer in charge of supervising defendant and informed him that she believed defendant was following her. RP 84. Ms. Gibbs specifically stated that there were several instances where she and defendant would cross paths on her way home from work and that she had received two phone calls from the motel where defendant had been staying. *Id.*

Defendant was administered a polygraph examination to determine whether or not he had been stalking Ms. Gibbs. RP 60. Defendant failed that polygraph examination. *Id.* Dr. DeWaelche contacted Mr. Cheney for more information about Ms. Gibbs's allegations concerning defendant and was informed that in addition to stalking Ms. Gibbs, defendant had

occasionally taken nude pictures of Ms. Gibbs while she was sleeping and engaged in sexual activity with Ms. Gibbs while she was sleeping. *Id.* Defendant was administered another polygraph examination to determine the validity of those allegations and failed that polygraph examination. RP 61.

In February, 2010, Dr. DeWaelche terminated defendant from treatment. *Id.* Dr. DeWaelche testified at the SSOSA revocation hearing that he terminated defendant from treatment because defendant had violated his SSOSA conditions and he was concerned about what else defendant might be doing. RP 77. Dr. DeWaelche testified that the particular allegations against defendant are of the nature that lead to sexually assaultive types of behavior. *Id.*

At the SSOSA revocation hearing, Ms. Gibbs testified that defendant had followed her on several occasions and shown up near Ms. Gibbs's work several times. RP 12, 15, 16. Ms. Gibbs also testified about an incident where she informed defendant that her godchildren would be visiting and that defendant was not to be around during that time. RP 18. However, defendant ignored Ms. Gibbs's request. *Id.* While the children were playing in a pool on Ms. Gibbs's property, defendant stayed in the area and repeatedly told Ms. Gibbs that her 1-year-old goddaughter should

be wearing a bathing suit instead of shorts and a tank top. *Id.* Defendant was adamant that the child be changed into a bathing suit. *Id.*

Ms. Gibbs further testified that defendant took nude and partially nude photos of Ms. Gibbs without her consent, and had sex with Ms. Gibbs while she was sleeping, without her consent. RP 19-20. Defendant also video taped himself, Ms. Gibbs, and a third party having sex without Ms. Gibbs's permission. RP 24.

Both Mr. Cheney and Dr. DeWaelche testified at the SSOSA revocation hearing that they recommend defendant's SSOSA be revoked. RP 61, 88.

After hearing all the evidence presented at the SSOSA revocation hearing, the Court revoked defendant's SSOSA status stating that defendant had failed to make adequate progress in treatment. RP 183.

C. ARGUMENT.

1. THE STATE PROVIDED ADEQUATE NOTICE TO DEFENDANT THAT THE STATE WAS SEEKING TO REVOKE HIS SSOSA STATUS FOR NONCOMPLIANCE.

Alleged violations of due process are reviewed de novo. *State v. Simpson*, 136 Wn. App. 812, 816, 150 P.3d 1167 (2007). An offender's SSOSA may be revoked at any time if a court is reasonably satisfied that an offender has violated a condition of his suspended sentence or failed to

make satisfactory progress in treatment. *State v. Dahl*, 139 Wn.2d 678,683, 990 P.2d 396 (1999) *citing* RCW 9.94A.120(8)(a)(vi).

The revocation of a suspended sentence is not a criminal proceeding. *Dahl*, 139 Wn.2d at 683 (*internal citations omitted*). An offender facing revocation of a suspended sentence has only minimal due process rights. *Id.* Sexual offenders who face SSOSA revocation are entitled to the same minimal due process rights as those afforded during the revocation of probation or parole. Such minimal due process entails:

(a) written notice of the claimed violations; (b) disclosure to the [offender] of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witnesses (unless there is a good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for the revocation.

Id. (*internal citation omitted*).

In the present case, defendant was given adequate notice that the State was seeking to revoke his SSOSA because he failed to comply with the terms. To support that allegation, the State filed a Motion for SSOSA Revocation. CP 41-54. In that motion, the State presented the following support for their claim that defendant violated the terms of SSOSA:

“According to the report from DeWaelche & Associates, Mr. Collins had been stalking his former girlfriend Shawna Gibbs on December 1, 2009. After the treatment provider learned of this information from the Community Corrections Officer, a polygraph was scheduled with Marty Gunderson to determine the merits of the allegations. It

was determined by the polygrapher that the defendant was deceptive in his answers relating to the reported incident.”

“The treatment termination report also outlined an allegation that the defendant had violated SSOSA conditions by taking nude pictures of Shawna Gibbs and having sexual contact with her while she slept.”

“On January, 27, 2010 Bud Killian performed a polygraph and determined the defendant was being deceitful when answering questions relating to the claims made by his former girlfriend Shawna Gibbs.”

CP 41-54. The motion further states:

“Mr. Collins’ multiple deceptive polygraph examinations, his behavior of stalking his former girlfriend, his behavior of having sexual contact with his girlfriend while she slept, his behavior of photographing his former girlfriend in the nude while she slept, his possessions of a computer generated photograph of five minor children, his non payment of his legal financial obligations and his termination from DeWaelche & Associates supports revocation in this case.”

CP 41-54. In addition to the State’s motion, defendant received notice of his SSOSA violations from Daniel DeWaelche, a Certified Sex Offender Treatment Provider, in a letter to Mike Cheney, Community Corrections Officer, regarding defendant’s termination from treatment. CP 39-40. Defendant’s counsel received a copy of that letter. *Id.* The letter stated that defendant had been terminated from treatment because of allegations that he was stalking Shawna Gibbs, had sex with Ms. Gibbs while she was sleeping, and attempted to be deceptive in two polygraph examinations. *Id.*

Defendant was also notified of his violations of SSOSA in the Notice of Violation submitted by Michael Cheney, Community Corrections Officer, which detailed the allegations that defendant had been stalking Ms. Gibbs and that defendant had possessed a computer generated photo of five minor age females, including defendant's victim. CP 79-84.

In *Dahl*, the defendant claimed that he was not provided adequate notice of his violations of SSOSA and therefore his due process rights were violated. *Dahl*, 139 Wn.2d 678. Dahl specifically claimed that each of his SSOSA violations should have been listed in his notice independently. *Id.* The Washington State Supreme Court found that it was not necessary for the State to list each violation against Dahl, reasoning that the State was not alleging that each incident was a separate violation of SSOSA but that the violation was that Dahl had failed to make reasonable progress in treatment and the incidents were used to support that claim¹. *Id.* at 684.

In the present case, defendant was notified that the State was seeking to revoke his SSOSA status because defendant had violated his SSOSA conditions. Just as in *Dahl*, it was not necessary for the State to list each and every violation of SSOSA defendant had committed. The State provided notice to defendant that it was seeking to revoke his

¹ Although the Court found that Dahl was provided adequate notice, it remanded the case for a new hearing because it found the trial court had improperly considered unreliable hearsay evidence.

SSOSA status because he had violated the terms of his treatment and provided defendant with notice of many of the violations defendant committed. The State was not required to list each and every SSOSA violation defendant committed.

Defendant argues that the State relied on the evidence that defendant videotaped himself, Ms. Gibbs and a third party having sex without Ms. Gibbs's permission and that the State's failure to inform defendant of that evidence violated the SSOSA notice requirements. Appellant's Brief, p. 7. However, *Dahl* holds that it is not necessary for the State to list each and every SSOSA violation defendant committed.

Additionally, although Ms. Gibbs and her mother testified about the videotape, it was defense counsel who continued to highlight that aspect of the evidence against defendant. Defense counsel asked Dr. DeWalsche, Mr. Cheney, and defendant about the videotape. RP 71, 91, 134. Defendant was given the opportunity to cross examine each witness about the videotape and that particular violation was just one of the many SSOSA violations defendant committed.

Furthermore, even without the evidence of the videotape, defendant's numerous SSOSA violations supported the revocation of his SSOSA status. Even if the State failed to provide defendant notice of the evidence related to the videotape incident, the error is harmless. Defendant was provided notice of a sufficient number of incidents that supported the State seeking revocation of his SSOSA status. Both Dr.

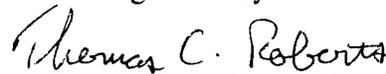
DeWaelsche and Mr. Cheney recommended to the Court that defendant's SSOSA status be revoked. The Court did not state that the basis of revocation of defendant's SSOSA status was the videotape. The Court stated the basis for the SSOSA revocation was that defendant had failed to make adequate progress in treatment. RP 183. It is likely that the Court would have found that the numerous SSOSA violations defendant committed supported revocation of his SSOSA status even without the videotape. The Court committed no error.

D. CONCLUSION.

For the above reasons, the State respectfully requests the Court affirm the revocation of defendant's SSOSA status.

DATED: December 14, 2010

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Karen Judy
Rule 9 Intern

COURT OF APPEALS
WASHINGTON

10 DEC 15 PM 1:18

STATE OF WASHINGTON
BY _____
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail by ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/14/10 _____
Date Signature